Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO S-02-321 OF 1994
GOPAL SRI RAM, NH CHAN AND SITI NORMA YAAKOB JJCA
27 MARCH, 6 APRIL 1995

Civil Procedure *— Disqualification of judge — Application to disqualify judge from hearing case — Judge commenting adversely on credibility of defence — Whether this disqualifies judge from further trying case — Whether fear of bias held by respondents reasonable — Test for real likelihood of bias*

Civil Procedure *— Injunction — Mareva injunction — Whether applicant has arguable case — Whether must be proved to higher standard than usual application for injunction — Whether strength of defence relevant*

Civil Procedure *— Trial — Role of judge — Whether judge must confine himself to points raised by counsel — Whether decision can be made on grounds not put to either party — Basis on which judge's decision should be made*

Civil Procedure *— Contempt of court — Allegation of bias against judge — Insufficient proof of bias adduced — Whether party alleging bias should be punished for contempt*

In the course of hearing an application for the extension of a Mareva injunction, Ian Chin J remarked that the defence put forward by the respondents was inherently incredible. This led the respondents to make an application to disqualify the judge from hearing the trial of the action. The judge did not find any substance in the grounds raised by the respondents but his Lordship nevertheless decided to disqualify himself for fear of accusations that he might be more accommodating to the respondents at the trial to dispel the allegations of bias raised by the respondents against him. The appellant was dissatisfied with the decision of the judge and appealed to the Court of Appeal.

Held, allowing the appeal and directing that Ian Chin J shall hear the trial of the action:

(1) (Per **Gopal Sri Ram JCA**) Whenever a court is required to judicially appreciate affidavit evidence, it is a necessary adjunct of that function for the court to ascertain whether the allegations made are inherently improbable or inherently incredible or patently inconsistent with contemporaneous documents. Whether such an analysis ought to be undertaken, depends upon the jurisdiction the court is exercising and, more importantly, upon the particular facts of a case.

(2) (Per **Gopal Sri Ram JCA**) It is part of the function of a judge hearing an application for an injunction to decide whether a serious question requiring trial is disclosed. He therefore does

not exceed his proper role in such an interlocutory proceeding by commenting upon the credibility of the evidence or any issue as it lies before him at that stage. A judge may, after expressing a view in the course of an interlocutory proceeding, quite properly hear the main action and come to a conclusion diametrically opposite to that expressed at the interlocutory level.

(3) (Per **Gopal Sri Ram JCA**) In the present case there was an added consideration in that the appellants were applying for a Mareva injunction. As such, the relative strength or weakness of the defence filed during the very early stages of the action was extremely relevant in assessing whether the appellants had an arguable case, which must be established to a higher standard than that applicable to the usual application for an injunction.

(4) (Per **Gopal Sri Ram JCA**) In arriving at a decision upon any matter that presents itself for curial scrutiny, a judge must confine himself to the points raised by counsel before him, unless he has first put a new point fairly to both sides. A judge must also decide any question in the light of the objective facts and in accordance with settled principles. On no account should his personal sentiment enter upon the scene.

(5) (Per **Gopal Sri Ram JCA**) The judge failed to act in accordance with settled principles. He decided upon disqualification not on the grounds argued before him. The record made no mention of the grounds relied upon by him as ever having been put to either side. The judge pointed out his lack of prejudice but was nevertheless not prepared to hear the case. His fear that an allegation might later be made against him was a non sequitur.

Cases referred to

Fary Jones Insurance Ltd v IFM Funding GmbH (English Court of Appeal, 10 April 1979) (unreported) (refd)

Hadmor Productions Ltd v Hamilton [1983] 1 AC 191; [1982] 1 All ER 1042; [1982] 2 WLR 322 (folld)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin [1984] 1 MLJ 160 (folld)

Tatiangela, The [1980] 2 Lloyd's Rep 193 (folld)

(6) (Per **NH Chan JCA**) Other than an interest which is pecuniary or proprietary in the subject matter of a proceeding, the law does not assume bias so as to disqualify a judge from acting in his judicial capacity. To disqualify a judge from acting in a judicial capacity on the ground of his interest (other than pecuniary or proprietary) in the subject matter of the proceeding, a real likelihood of bias must be shown.

(7) (Per **NH Chan JCA**) In considering whether there was a real likelihood of bias, the court does not look at the mind of the

judge himself to see if there was a real likelihood that he would, or did in fact, favour one side at the expense of the other. The court looks at the impression which would be given to other people. If right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, the judge should not hear the case.

(8) (Per **NH Chan JCA**) The instant case was not a case of a judge who had any direct pecuniary or proprietary interest in the subject matter of the proceeding. The law would thus not assume bias on the part of the judge. The facts which would lead a right-minded person to think that there was a real likelihood of bias or which could have given reasonable ground for him to suspect bias on the part of the judge had not been disclosed. There was only an imputation of bias which was not sufficient. The judge therefore should not have disqualified himself.

Cases referred to

Metropolitan Properties Co (FGC) Ltd v Lannon [1969] 1 QB 577 (folld)

R v Camborne Justices, ex p Pearce [1955] 1 QB 41; [1954] 2 All ER 850 (folld)

R v Davies [1906] 1 KB 32 (refd)

R v East Kerrier Justices, ex p Mundy [1952] 2 QB 719; [1952] 2 All ER 144 (refd)

R v Liverpool City Justices, ex p Topping [1983] 1 All ER 490; [1983] 1 WLR 119 (folld)

R v Lovegrove [1951] 1 All ER 804 (refd)

R v New Statesman, ex p Director of Public Prosecutions (1928) 44 TLR 301 (refd)

R v Sharman (1913) 9 Cr App R 130 (refd)

Per curiam:

(1) (Per **Gopal Sri Ram JCA**) I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is more capable of eroding public confidence in the judicial arm of the state than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.

(2) (Per **NH Chan JCA**) If parties were to be allowed to select the judges who hear their cases or appeals, the business of the court could not be carried out.

[Bahasa Malaysia summary

Semasa mendengar satu permohonan untuk perlanjutan satu injunksi Mareva, Ian Chin H telah menyatakan bahawa pembelaan yang dikemukakan oleh responden sememangnya sukar dipercayai. Ini berkesudahan dengan responden membuat satu permohonan untuk

melucutkan kelayakan hakim itu daripada terus mendengar perbicaraan tindakan itu. Hakim itu tidak mendapati apa-apa asas di dalam alasan yang diutarakan oleh responden tetapi hakim yang arif, walau bagaimanapun, membuat keputusan untuk melucutkan kelayakannya atas sebab beliau mungkin dituduh akan memihak kepada responden di perbicaraan untuk melenyapkan dakwaan berat sebelah yang dibuat oleh responden terhadapnya. Perayu tidak berpuas hati dengan keputusan hakim itu dan seterusnya membuat rayuan kepada Mahkamah Rayuan.

Diputuskan, membenarkan rayuan itu dan mengarahkan supaya Ian Chin H mendengar perbicaraan tindakan itu:

(1) (Oleh **Gopal Sri Ram HMR**) Apabila sesebuah mahkamah dikehendaki memahami secara kehakiman keterangan afidavit, adalah menjadi satu tugas sambilan yang perlu untuk mahkamah itu memastikan sama ada dakwaan-dakwaan yang dibuat itu adalah sememangnya tidak mungkin atau sememangnya sukar dipercayai atau jelasnya bercanggahan dengan dokumen-dokumen semasa. Sama ada analisa sedemikian patut dilakukan bergantung kepada bidang kuasa yang sedang dijalankan oleh mahkamah itu dan, lebih penting lagi, bergantung kepada fakta-fakta tertentu sesuatu kes itu.

(2) (Oleh **Gopal Sri Ram HMR**) Adalah menjadi sebahagian tugas seorang hakim yang mendengar sesuatu permohonan untuk satu injunksi untuk memutuskan sama ada satu soalan serius yang memerlukan perbicaraan telah diutarakan. Oleh itu beliau tidak terkeluar daripada fungsi yang betul di dalam prosiding interlokutori sedemikian apabila beliau membuat komen tentang kebolehpercayaan keterangan atau apa-apa isu yang timbul di depannya pada peringkat itu. Seorang hakim boleh, selepas memberikan sesuatu pendapat semasa perjalanan sesuatu prosiding interlokutori, mendengar tindakan utama itu dan mencapai keputusan yang bertentangan sepenuhnya dengan pendapat yang telah diberikannya pada peringkat interlokutori.

(3) (Oleh **Gopal Sri Ram HMR**) Di dalam kes ini, terdapat satu pertimbangan tambahan kerana perayu telah memohon untuk satu injunksi Mareva. Oleh itu, kekuatan atau kelemahan relatif pembelaan yang difailkan semasa peringkat awal tindakan itu adalah sangat relevan dalam memutuskan sama ada perayu mempunyai yang kes yang boleh dihujah, yang mesti didirikan pada taraf yang lebih tinggi daripada taraf yang terpakai kepada satu permohonan biasa untuk satu injunksi.

(4) (Oleh **Gopal Sri Ram HMR**) Dalam membuat satu keputusan atas sebarang perkara yang timbul untuk penelitian kehakiman, seorang hakim mesti menghadkan dirinya kepada alasan-alasan yang dihujah oleh peguambela di depannya, melainkan beliau

telah terlebih dahulu membentangkan sesuatu perkara baru secara adil kepada kedua-dua pihak itu. Seorang hakim juga mesti memutuskan sebarang soalan berpandukan fakta-fakta objektif dan menurut prinsip-prinsip yang mantap. Atas apa-apa alasan sekalipun, perasaan peribadinya tidak patut dilibatkan.

(5) (Oleh **Gopal Sri Ram HMR**) Hakim itu telah gagal bertindak mengikut prinsip-prinsip yang mantap. Beliau membuat keputusan untuk melucutkan kelayakannya bukan atas alasan yang dihujah di dapannya. Rekod tindakan tidak menyatakan bahawa alasan yang digunakannya telah dibentangkan kepada pihak-pihak berkenaan. Hakim itu telah menunjukkan bagaimana beliau tidak berat sebelah tetapi namun demikian tidak bersedia mendengar kes itu. Kebimbangannya bahawa satu dakwaan mungkin dibuat terhadapnya selepas itu tidak bererti.

(6) (Oleh **NH Chan HMR**) Selain daripada satu kepentingan yang berbentuk wang atau ketuanpunyaan di dalam isi perkara sesuatu prosiding, undang-undang tidak menganggap tindakan berat sebelah untuk melucutkan kelayakan seorang hakim daripada bertindak dalam kedudukan kehakimannya. Untuk melucutkan kelayakan seorang hakim daripada bertindak di dalam kedudukan kehakimannya atas alasan kepentingannya (selain daripada yang berbentuk wang atau ketuanpunyaan) di dalam isi perkara sesuatu prosiding, kemungkinan sebenar tindakan berat sebelah mesti ditunjukkan.

(7) (Oleh **NH Chan HMR**) Dalam memutuskan sama ada terdapat kemungkinan sebenar tindakan berat sebelah, mahkamah tidak memerhatikan fikiran hakim itu sendiri untuk melihat sama ada terdapat kemungkinan sebenar bahawa beliau akan, atau pada hakikatnya telah, memihak kepada sesuatu pihak dan merugikan pihak yang satu lagi. Mahkamah melihat kepada tanggapan yang akan diberikan kepada orang lain. Jika orang-orang yang berfikiran waras akan berfikir bahawa dalam keadaan tersebut terdapat kemungkinan sebenar hakim itu akan bertindak berat sebelah, beliau tidak patut mendengar kes itu.

(8) (Oleh **NH Chan HMR**) Kes sekarang ini bukanlah satu kes seorang hakim yang mempunyai sebarang kepentingan langsung yang berbentuk wang atau ketuanpunyaan di dalam isi perkara prosiding itu. Oleh itu, undang-undang tidak akan membuat anggapan bahawa hakim itu telah bertindak berat sebelah. Fakta-fakta yang akan membuat seseorang yang berfikiran waras berfikir bahawa terdapat kemungkinan sebenar tindakan berat sebelah atau yang mungkin boleh memberi asas munasabah bagi orang itu mengesyaki tindakan berat sebelah oleh hakim itu tidak diutarakan. Cuma terdapat satu imputasi tindakan berat sebelah yang tidaklah mencukupi. Oleh itu, hakim itu tidak patut melucutkan kelayakan dirinya.

Per curiam:

(1) (Oleh **Gopal Sri Ram HMR**) Saya melihat satu arah aliran kebelakangan ini untuk mendakwa tindakan berat sebelah terhadap seorang hakim dengan sewenang-wenangnya atas asas yang tidak mencukupi. Tiada apa-apa yang lebih berkesan menghakis kepercayaan awam pada badan kehakiman negara daripada dakwaan tindakan berat sebelah yang tidak berasas. Ianya oleh itu patut dihindarkan walau pada apapun kos yang terlibat, jika perlu, dengan menggunakan kuasa untuk menghukum bagi penghinaan.

(2) (Oleh **NH Chan HMR**) Jika pihak-pihak dibenarkan memilih hakim yang mendengar kes atau rayuan mereka, urusan mahkamah tidak akan dapat dijalankan.]

Notes

For a case on the disqualification of a judge, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1169.

For cases on Mareva injunctions, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1662–1701.

For cases on the role of a judge, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3622–3623.

For cases on contempt of court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 788–837.

Complete list of cases referred to

Fary Jones Insurance Ltd v IFM Funding GmbH (English Court of Appeal, 10 April 1979) (unreported)

Hadmor Productions Ltd v Hamilton [1983] 1 AC 191; [1982] 1 All ER 1042; [1982] 2 WLR 322

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193

Metropolitan Properties Co (FGC) Ltd v Lannon [1969] 1 QB 599

R v Camborne Justices, ex p Pearce [1955] 1 QB 41; [1954] 2 All ER 850

R v Davies [1906] 1 KB 32

R v East Kerrier Justices, ex p Mundy [1952] 2 QB 719; [1952] 2 All ER 144

R v Liverpool City Justices, ex p Topping [1983] 1 All ER 490; [1983] 1 WLR 119

R v Lovegrove [1951] 1 All ER 804

R v New Statesman, ex p Director of Public Prosecutions (1928) 44 TLR 301

R v Sharman (1913) 9 Cr App R 130

Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin [1984] 1 MLJ 160

Tatiangela, The [1980] 2 Lloyd's Rep 193

Appeal from: Suit No K 22–27 of 1994 (High Court, Kota Kinabalu)

A *Roderic Fernandez* (*Shelley Yap Leong Tseu Chong Chia & Co*) for the appellant.

Sugumar Balakrishnan (*Sugumar & Co*) for the respondents.

Cur Adv Vult

B **Gopal Sri Ram JCA**: In the course of hearing an application for the extension of an injunction — I presume that it was a Mareva injunction, for there is nothing in the judgment that gives any indication as to what kind of injunction it was — Ian Chin J made a remark about the quality of the defence delivered by the respondents (the second to the ninth defendants C in the court below). I will advert to the remark in a moment. It led to the respondents making an application to disqualify the learned judge from hearing the trial of the action. He acceded to their request; but, as will appear later, not for any of the reasons advanced by the respondents. The appellant (the plaintiff in the court below), being dissatisfied with the D decision of the learned judge, appealed to this court.

This is what the learned judge said in relation to one of the issues raised in the respondents' defence:

> Mr Sugumar Balakrishnan next argued that the plaintiff does not have a good arguable case. It will be recalled that the plaintiff's case is that through E the fraud or conspiracy of the defendants or the breach of trust or fiduciary duty of the first defendant the defendants have profited from the RM7,681,000 which the plaintiff had released through the accounts of the second to the sixth defendants. He argued that the sum of RM7,681,000 was given to the second to the sixth defendants as a temporary overdraft. I had at the hearing interjected and asked counsel what was the term of the F temporary overdraft, like for how long and for what amount. He was not able to answer. What we have here is this. The plaintiff's case is that over a period of about 12 months, the first defendant had caused cheques to be marked and regarded cheques as good for payment when he should not with the result that the plaintiff lost RM7,681,000 and the second to the sixth defendants are the direct beneficiaries of the proceeds while the seventh to G ninth defendants are also beneficiaries of part of these proceeds. *The second to the sixth defendants' case appear (sic) to be that they have an indefinite, as opposed to temporary, overdraft for an unlimited amount from the plaintiff and that the said RM7,681,000 is part of the overdraft; which defence, to say the least, is inherently incredible.* Given the defence advanced and which I have just adversely commented on, I cannot see how it can be said that the H plaintiff does not have an arguable case. (Emphasis added.)

Counsel for the respondents took the view that the learned judge ought not to have expressed what he regarded as a concluded view upon his clients' defence. Indeed he made complaint of it before us. This court has in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] I 1 MLJ 193 set out the principles that should guide a court when considering an application for an injunction. What was said there are, and were meant to be, guidelines: for each case must turn upon its own facts.

Now, nothing that was said by this court in *Keet Gerald* is to be taken as detracting from the right, and indeed the duty, of a judge, in appropriate

cases, to undertake a qualitative analysis of the affidavit evidence presented before him. In a case like the present, I can do no better than to adopt the words of Lee Hun Hoe CJ (Borneo) in *Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin* [1984] 1 MLJ 160 where he said [at p 163 col 2G–H]:

> The onus of the caveator, prompted by the analogy with interlocutory injunction, is that before any question of balance of convenience can arise the party seeking the injunction must satisfy the court that his claim is neither frivolous nor vexatious in other words that the evidence before the court discloses a serious question to be tried. Not all disputes of fact necessarily raise serious questions to be tried. It is of course quite right to say that it is undesirable to resolve disputes on affidavit evidence. Yet judges are expected in applying the test to be critical of the affidavit evidence which must on the face be at least plausible.

Although the views expressed by his Lordship the Chief Justice of Borneo were in the context of an application to remove a caveat, they are, I think, of general application. Whenever a court is required to judicially appreciate affidavit evidence, it is a necessary adjunct of that function to ascertain whether allegations made are inherently improbable or inherently incredible or patently inconsistent with contemporaneous documents. Whether such an analysis ought to be undertaken depends upon the jurisdiction the court is exercising and, more importantly, upon the particular facts of a case.

It is part of the function of a judge hearing an application for an injunction to decide whether a serious question requiring trial is disclosed. He therefore does not exceed his proper role in such an interlocutory proceeding by commenting upon the credibility of the evidence or any issue as it lies before him at that stage. And any comments that he may make upon the nature and quality of the evidence or pleadings presented to him at that stage do not and cannot be said to infect his mind with bias. In my judgment, it is a most serious matter to allege bias against a judge whose sole function is to decide a case according to the evidence before him. I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is capable of eroding public confidence in the judicial arm of the state than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.

In my judgment, a judge may, after expressing a view in the course of an interlocutory proceeding, quite properly hear the main action and come to a conclusion diametrically opposite to that expressed at the interlocutory level. Translated to a case such as the present, a judge may grant an interlocutory injunction because he finds a particular line of defence taken to be untenable and yet, after hearing all the evidence and detailed argument at the trial, reach the opposite conclusion and dismiss the suit. I cannot help but think that such an occurrence is commonplace in our courts as it is indeed in other jurisdictions.

A In the present case there is an added consideration. The appellants were, as I surmise, applying for a Mareva injunction. As such, the relative strength or weakness of the defence filed during the very early stages of the action is extremely relevant in assessing whether the plaintiff has an arguable case. It is a higher standard than that applicable to the usual application for an injunction. (See *The Tatiangela* [1980] 2 Lloyd's Rep 193.) That this ought to be so is not in the least surprising: for the allegation made is that there is a risk of the defendant dissipating his assets with a view to defeating any judgment that the plaintiff may obtain against him. Since the relief is postulated upon a plaintiff's success in the main action, for example, damages, it is only right and proper that the strength of his case be tested to ascertain how high the probabilities lie in favour of his ultimate success. The higher the degree of success, the greater is the need to protect that event by ensuring that he does not get a judgment that is as good as writ on running water. This, then, is the philosophy of the Mareva jurisdiction as distilled from the authorities upon the subject.

When a judge comes to assess the strength of a plaintiff's case, it is a natural and essential part of that exercise to undertake an examination of the defences taken to the main action. The stronger the defence on its face, the less likely that the plaintiff will succeed in his action; and less the reason to grant him interim protection. To invert the proposition, the weaker the defence on its face, the greater is the probability of the plaintiff's success in getting his judgment. That in my view is the correct approach to be adopted. The English Court of Appeal in an unreported case adopted the same approach. (See *Fary Jones Insurance Ltd v IFM Funding GmbH*, decided on 10 April 1979.)

The court, when exercising the jurisdiction that is seised of, is required to conduct a balancing exercise in order to do justice to the parties. Imposing a restraint upon a man from dealing with what is prima facie his property is a very serious matter indeed. It is for that reason that equity requires the parties to submit their respective cases to a critical scrutiny by the court. In the end, it is a matter that depends upon the particular factual matrix that lies before the judge and upon his assessment of where the justice of the case lies.

It must also be remembered that defences are not static. Amendments may well turn what seemed a hopeless defence at the interlocutory level to a complete answer to the claim at the trial. Remarks about the quality of a defence as it stands at the interlocutory stage are tentative only. Mature and detailed argument and the quality of evidence at the trial may well lead a judge to conclude that the preliminary view that he had formed earlier requires revision. All this is part of trial work.

I realise that I have taken some time to deal with the principles that govern the kind of application that faced the learned judge in this case. I have done so in order to demonstrate that he acted well within the province assigned to him by law and how unnecessary, wasteful and unreasonable the application for his disqualification was in the circumstances of this case.

In deciding to withdraw from hearing the main action, the learned judge did not accept the reasons advanced by the respondents. He gave his own. This is what he said:

> Mr Sugumar Balakrishnan had submitted at length, some ten pages of written submission, as to why I should disqualify myself and even though I do not find any substance in the grounds, I am bothered that in the light of the allegations I may, at the other end of the scale, be accused that I could possibly at the trial bend over backward to give a better light to the evidence of the defendants than justified since the allegations of bias against the defendants may still weigh on me. Mr Roderic Fernandez argued that if I should disqualify myself it may provide a precedent for a party to choose his own judge for his case. Though that danger presents itself but what I decide in this case is of course peculiar to the facts of this case. I have decided to disqualify myself because of the allegations made in the lengthy submission of Mr Sugumar Balakrishnan which may, for the reason I have stated, work against the plaintiff. I do not wish to be saddled with those allegations while hearing the case at the trial.

There are two matters that call for comment upon the approach taken by the learned judge. First, in arriving at a decision upon any matter that presents itself for curial scrutiny, a judge must confine himself to the points raised by counsel before him. He may not decide a case upon a matter not raised by counsel unless he has first put the point fairly to both sides. It is not a matter of mere technicality. It is a rule of essential justice. The principle was stated by Lord Diplock in *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191 at p 233; [1982] 1 All ER 1042 at p 1056; [1982] 2 WLR 322 at p 337, in words that merit recollection:

> Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is. In the instant case counsel for Hamilton and Bould complained that Lord Denning MR had selected one speech alone to rely upon out of many that had been made in the course of the passage of what was a highly controversial Bill through the two Houses of Parliament; and that if he, as counsel, had known that the Master of the Rolls was going to do that, not only would he have wished to criticise what Lord Wedderbum had said in his speech in the House of Lords, but he would also have wished to rely on other speeches disagreeing with Lord Wedderburn if he, as counsel, had been entitled to refer to *Hansard*.

Secondly, a judicial arbiter must decide any question presented to him for decision in the light of the objective facts and in accordance with settled principles. On no account should his personal sentiment enter upon the scene. Criticism of a judge is part of the territory in which he operates. So long as that criticism is made bona fide, based on fact and in conformity with law, none, least of all a judge, should mind: for there is no acquisition of knowledge without criticism. Over-sensitivity to criticism may result in ignorance, or much worse, intellectual arrogance. To decide a point in fear

A of criticism is to abdicate duty. These are matters that form part of a well-recognized judicial philosophy and should require no reiteration.

In my judgment the learned judge failed to act in accordance with these principles. He decided upon disqualification, not on grounds argued before him. The record makes no mention of the grounds relied upon by B him as ever having been put to either side. His fear that an allegation may later be made against him is a non sequitur. In his carefully reasoned judgment, the learned judge was at pains to point out his lack of prejudice. Yet he was not prepared to hear the case. That to my mind is wrong.

Counsel for the respondents quite correctly drew our attention to the C principle by which an appellate court does not interfere with the exercise of discretion by a judge at first instance. But it is quite plain to me that this one of those exceptions where appellate interference is not only permissible but warranted. Despite Encik Sugumar Balakrishnan's careful argument, I am convinced that he ought not to have asked the learned judge to withdraw from hearing the case, and that the learned judge ought not to D have obliged. Encik Sugumar ought to have had a little more respect for the learned judge's ability to decide the case upon the evidence. He ought to have had as much faith in the ability of this court to intervene where a judge has decided a case otherwise than in accordance with law and the evidence.

E For these reasons the appeal was allowed and the usual orders as to costs made against the respondents. We also directed that Ian Chin J, shall hear the trial of the action.

NH Chan JCA: I agree with my brother, Gopal Sri Ram JCA, that the F appeal should be allowed. I only wish to add this.

Other than an interest which is pecuniary or proprietary in the subject matter of the proceeding, the law does not assume bias so as to disqualify a judge from acting in his judicial capacity.

Bias with regard to anyone acting in a judicial capacity means anything G which tends or may be regarded as tending to cause such person to decide a case otherwise than on the evidence (*R v East Kerrier Justices* [1952] 2 QB 719; [1952] 2 All ER 144); 1 *Jowitt's Dictionary of English Law* (2nd Ed), under 'Bias' at p 210.

In *R v Camborne Justices, ex p Pearce* [1955] 1 QB 41 at p 47; [1954] H 2 All ER 850 at pp 852–853, Slade J, giving the judgment of the court (Lord Goddard CJ, Cassels and Slade JJ) said this:

> ... The question which this court has to decide is: 'What interest in a judicial or quasi-judicial proceeding does the law regard as sufficient to incapacitate a person from adjudicating or assisting in adjudicating on it I upon the ground of bias or appearance of bias?' It is, of course, clear that any direct pecuniary or proprietary interest in the subject matter of a proceeding, however small, operates as an automatic disqualification. In such a case the law assumes bias. What interest short of that will suffice?

The judge then went on to say this ([1955] 1 QB 41 at pp 47 and 48; [1954] 2 All ER 850 at p 853): A

> ... the authorities as a whole are almost overwhelming in support of the requirement that, to use the well-known words of Blackburn J in *R v Rand* (1866) LR 1 QB 230 at p 232, 'a real likelihood' of bias must be proved to exist before proceedings will be vitiated on the ground that a person who has taken part or assisted in adjudicating upon them was in law incapacitated by interest from doing so. B

And he concluded by saying ([1955] 1 QB 41 at p 51; [1954] 2 All ER 850 at p 855):

> In the judgment of this court the right test is that prescribed by Blackburn J, namely, that to disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceeding, a real likelihood of bias must be shown. C

It was held in that case, and I need to read only from the headnote ([1955] 1 QB 41 at p 42; see Slade J ([1955] 1 QB 41 at pp 51 and 52; [1954] 2 All ER 850 at p 855)): D

> ... that, to disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceeding, a real likelihood of bias must be shown not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries. In the present case, the facts did not disclose any real likelihood of bias and the application should be dismissed. E
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> Dictum of Blackburn J in *R v Rand* (1866) LR 1 QB 230 at p 232, applied. F
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> Per curiam. The frequency with which allegations of bias have come before the courts in recent times seems to indicate that Lord Hewart CJ's reminder in *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256 at p 259, that it 'is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seem to be done' is being urged as a warrant for quashing convictions or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretexts of bias. Whilst indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than it should in fact be done. G H

In *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at p 599, Lord Denning MR said:

> ... in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the I

A circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand; see *R v Huggins* [1895] 1 QB 563; and *R v Sunderland Justices* [1901] 2 KB 357, CA, per Vaughan Williams LJ (at p 373). Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *R v Camborne Justices, ex p Pearce* [1955] 1 Q 41 at pp 48–51; [1954] 2 All ER 850, and *R v* B *Nailsworth Licensing Justices, ex p Bird* [1953] 2 All ER 652; [1953] 1 WLR 1046. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain C enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'

Ackner LJ, giving the judgment of the court (Ackner LJ and Webster J) in *R v Liverpool City Justices, ex p Topping* [[1983] 1 All ER 490 at p 494; 1983] 1 WLR 119 at p 123 said:

D In our view, therefore, the correct test to apply is whether there is the appearance of bias, rather than whether there is actual bias.

In the past there has also been a conflict of view as to the way in which that test should be applied. Must there appear to be a real likelihood of bias? Or is it enough if there appears to be a reasonable suspicion of bias? ... We E accept the view of Cross LJ expressed in *Hannam v Bradford City Council* [1970] 1 WLR 937 at p 949 that there is really little, if any, difference between the two tests:

> 'If a reasonable person who has no knowledge of the matter beyond knowledge of the relationship which subsists between some members of the tribunal and one of the parties would think that there might well be F bias, then there is in his opinion a real likelihood of bias. Of course, someone else with inside knowledge of the character of the members in question might say: 'Although things don't look very well, in fact there is no real likelihood of bias.' But that would be beside the point, because the question is not whether the tribunal will in fact be biased, but whether a reasonable man with no inside knowledge might well G think that it might be biased.'

We conclude that the test to be applied can conveniently be expressed by slightly adapting the words of Lord Widgery CJ in a test which he laid down in *R v Uxbridge Justices, ex p Burbridge* (*The Times*, 20 June 1972) and referred to by him in *R v McLean, ex p Aikens* (1974) 139 JP 261 at p 266: H would a reasonable and fair-minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant was not possible?

The law will not suppose a possibility of bias in a judge who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea: 3 Bl Comm 361. In consequence, the I court has regarded with particular seriousness allegations of partiality or bias on the part of a judge or a court as punishable contempts of court: see 9 *Halsbury's Laws of England* (4th Ed) at p 21, para 27. In *R v Davies* [1906] 1 KB 32, Wills J, giving the judgment of the court (Lord Alverstone CJ,

Wills and Darling JJ) said that the punishment for attacks upon courts is inflicted, and I quote (at p 40):

> ... not [for] the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of them, but of protecting the public, and especially those who, either voluntarily or by compulsion, are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired.

In *R v New Statesman, ex p Director of Public Prosecutions* (1928) 44 TLR 301, it was held that an imputation of unfairness and lack of impartiality to a judge in the discharge of his judicial duties constitutes contempt of court. Lord Hewart CJ, giving the judgment of the court (Lord Hewart CJ, Shearman and Branson JJ) said, at p 302, that:

> ... in the opinion of the court the meaning of the words complained of was quite free from ambiguity. They meant what they said, and said very plainly — namely, that a person who held certain views could not hope for a fair hearing in a court presided over by the learned judge who was named.
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> ... The words meant that in the opinion of the writer it was impossible for a person holding certain views to get a fair hearing before that judge.

And at p 303, the Lord Chief Justice concluded thus:

> ... the court had no doubt that the article complained of did constitute a contempt. It imputed unfairness and lack of impartiality to a judge in the discharge of his judicial duties. The gravemen of the offence was that by lowering his authority it interfered with the performance of his judicial duties.

The instant case is not a case of a judge who has any direct pecuniary or proprietary interest in the subject matter of a proceeding. It is, of course, plain that in such a case the law assumes bias.

In the instant case, the law did not assume bias on the part of the judge. There must be circumstances which would lead a reasonable and fair-minded person sitting in court to have reasonable ground to suspect that the judge would appear to be biased. In the present case, the facts which would lead a right-minded person to think that there was a real likelihood of bias or which could have given reasonable ground for him to suspect bias on the part of the judge had not been disclosed. There was only an imputation of bias: it is this, because the judge had found against the respondents at the interlocutory injunction stage and had commented adversely on their evidence in the process, he should be disqualified from hearing the case at the trial. As was said by Lord Denning MR in *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at p 599: 'Surmise or conjecture is not enough.' Circumstances must be shown to exist which would tend or which might be regarded as tending to cause the case not to be decided on the evidence. The proper test on the appearance of bias is whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have ground to suspect that a fair trial would not be possible. Applying these principles, ought the judge to have disqualified himself from sitting? In my judgment, there was no ground for

a reasonable an fair-minded onlooker knowing all the relevant facts to suspect or to have any reasonable fear that a fair hearing would not be possible before this judge at the trial. The judge should not have disqualified himself. Just because the judge had commented adversely on the credibility of the evidence before him in an interlocutory proceeding does not mean that he will not decide the case on the evidence adduced before him at the trial. To use the words of Blackstone, the law will not suppose a possibility of bias in a judge whose authority greatly depends upon the presumption and idea that he is already sworn to administer impartial justice.

To use the words of Darling J in *R v Sharman* (1930) 9 Cr App Rep 130; 'if the appellants' and I may add, or parties, 'are to be allowed to select the judges who shall hear their appeals,' and I may also add, or cases, 'the business of the court could not be carried out'.

In *R v Lovegrove* [1951] 1 All ER 804, Lord Goddard CJ, giving the judgment of the court (Lord Goddard CJ, Cassels and Lynskey JJ) said, at pp 804 and 805 (since it is a short judgment I have reproduced it in full):

> The applicant was convicted before Lynskey J, at Bedford Assizes, and his application for leave to appeal, which has been refused by the single judge, now comes before this court of which Lynskey J is a member. It has undoubtedly been the practice recently, if the trial judge happens to be sitting in the Court of Criminal Appeal, to adjourn the case, but the question is whether that practice need be followed in all cases in future.
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> This matter was considered many years ago, and it was pointed out that in civil cases before the Supreme Court of Judicature Act 1873, when there was no Court of Appeal and appeals were heard by judges of the three common law courts in banc, it was quite a common practice for the judge before whom the trial had taken place, and whose ruling, indeed, might be impugned, to sit as a member of the court, even, in some cases, where he had sealed the bill of exceptions. This matter was considered in *R v Sharman (alias Sutherland)* (1913) 9 Cr App R 130, where an application for an adjournment was made on behalf of the appellant on the ground that Ridley J, who tried the case, was presiding in the Court of Criminal Appeal. Darling J, giving the judgment of the court, said (9 Cr App R 130):
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> > 'I think this application ought not to be granted. After the assizes, appeals come from all parts of the country; and if appellants are to be allowed to select the judges who shall hear their appeals, the business of the court could not be carried on. Before the days of the Judicature Act, when the Courts of Queen's Bench, Commons Pleas and Exchequer sat in court to hear appeals (of course, not criminal appeals), it was the usual practice for the judge who tried the case to be present.'
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> The matter was considered again the same year in *R v Bennet, R v Newton* (1913) 9 Cr App R 146. The report states that, on an application that the sentence might run from the date of conviction, Darling J said that (9 Cr App R 157):
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> > '... the case was in the list, but defendants wished it to be postponed because the trial judge was then a member of the court. There was, of course, no statutory objection to the judge sitting, and it would almost be impracticable to prohibit this unless there were more judges in that

> Division. There was always an investigation by a single judge before a case came into that court, and there must be at least two other judges with the trial judge. It was a great mistake to suppose that the trial judge would be inclined to set up his view against the opinions of his brethren or 'to fight for his own hand'. The trial judge in this case at once assented to the adjournment. Lord Alverstone had always strongly objected to such applications being granted as matters of course.'
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> There are cases in which, no doubt, it would be desirable that the trial judge should not sit, but where the ground of appeal is nothing but an argument by the appellant that the verdict was wrong there is no reason whatever why the trial judge should not sit. In fact, it might be very useful sometimes that he should. In the present case the applicant was convicted before Lynskey J, on two charges of receiving stolen property and was sentenced to five years' imprisonment. ... He gave no explanation which could be accepted by the jury and he was convicted. It was purely a matter for the jury and he only argues in his notice of appeal that the jury ought not to have convicted him. That is not a ground which this court ever entertains and the application is dismissed.

There may be cases in which it would be desirable that the trial judge or the judge who heard an application at an interlocutory stage should not sit at a later stage of the proceeding. The principles applicable for disqualification are that which I have stated in this judgment. It is that the law will not suppose a possibility of bias in a judge hearing the case whose authority greatly depends on the presumption and idea that he will administer impartial justice and, any attempt at lowering his authority or to undermine or impair it would interfere with the performance of his judicial duties. To disqualify a judge, there must be circumstances or facts which have been shown to exist which would lead a reasonable and fair-minded onlooker or which would have given reasonable ground for him to suspect that the case would not be decided according to the evidence.

6 April 1995

Siti Norma Yaakob JCA: I have had the opportunity of reading the draft judgments of my brothers, Gopal Sri Ram and NH Chan JJCA, and I confirm that the reasons given in those judgments reflect my own reasons why the appeal had been allowed with costs.

Appeal allowed.

Reported by Kevin Ooi